and SESAC. Inc.; and the Devotional Claimants, representing various owners of religious programming. These copyright claimants shall be referred to collectively as the "copyright owners". Satellite carriers filed two written direct cases. One case was filed by the Satellite Broadcasting & Communications Association ("SBCA"), representing AlphaStar Television, Inc., BosCom, Inc. (added by Notice of Amendment filed on June 27, 1997), Consumer Satellite Systems, DirecTV, Inc. (a division of Hughes Electronics Corp.), EchoStar Communications Corporation, Netlink USA, PrimeStar Partners L.P., PrimeTime 24 Joint Venture, Southern Satellite Systems, Inc. and Superstar Satellite Entertainment (a division of United Video Satellite Group, Inc). Advance Entertainment Inc. was originally represented by SBCA but deleted by Notice of Amendment filed on June 27, 1997. These carriers shall be referred to collectively as the "satellite carriers". The other written direct case was filed by American Sky Broadcasting L.L.C. ("ASkyB"), an entity that has purchased satellite orbital slots and plans to provide satellite delivered programming later this year.

Pursuant to 17 U.S.C. § 801(c) and 37 CFR § 251.45, the Copyright Office ruled upon all prehearing motions and objections until the Panel was convened. The Panel convened the administrative hearing on March 4, 1997, and pursuant to 37 CFR § 251.47, the parties presented their direct oral cases and concluded them on April 16, 1997. By joint motion, the parties moved for waiver of rebuttal cases and for an opportunity to present final oral argument. Pursuant to 37 CFR §§ 251.42 and .43, by Order dated May 2, 1997, the Panel cancelled rebuttal cases and established a revised schedule for submission of proposed findings of fact and conclusions of law ("PFFCL") and presentation of final oral argument. On May 23, 1997, PBS and JSC filed separate motions which were tantamount to motions to dismiss the case of ASkyB. Because these motions were potentially dispositive with respect to ASkyB, and because other copyright owners advanced similar arguments in their PFFCL, by Order of June 24, 1997, the Panel deferred the motions for final oral argument and reserved ruling until issuance of this Report. Pursuant to 37 CFR 251.52, in accordance with the Panel's Order, the parties filed PFFCL by June 6, 1997 and Replies by June 27, 1997. In accordance with our Order of July 18, 1997, SBCA filed a revised PFFCL on August 4, 1997. By Order of August 6, 1997, the separately filed Reply PFFCL of EchoStar was stricken from the record. Oral argument was heard on July 18, 1997 and the record was formally closed by Order dated August 14, 1997.

ISSUE

The Panel's task is to set the statutory compulsory license fees for the period July 1, 1997 through December 31, 1999, which shall be paid by satellite carriers to copyright owners for the rights to retransmit television broadcast signals to home satellite dish owners for private home viewing. To that end, Congress has directed the Panel to set fees that "most clearly represent the fair market value of secondary transmissions" (retransmissions) of broadcast signals.[2]

DISCUSSION AND FINDINGS

Exhibits

A description of the status and admissibility of all hearing exhibits, in accordance with

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[2] Section 119(c)(3)(B) actually *appears* to prescribe criteria in addition to the fair market value criterion of § 119(c)(3)(D). However, before the Panel was convened, the Copyright Office ruled that Congress had clearly intended to repeal the language of (c)(3)(B), which originally appeared in the 1988 SHVA, to be replaced by the language of (c)(3)(D). Instead, due to a scrivener's drafting error, the old language was retained and the new language was erroneously codified as 17 U.S.C. § 119(c)(3)(D) (1994). Order of Copyright Office, Docket No. 96-3 CARP-SRA (January 6, 1997).

agreements of the parties and Panel Orders of May 14, 1997 and August 14, 1997, is attached hereto as Appendix 1.

Witnesses

JSC presented written and oral testimony of four witnesses: James Michael Trautman, Senior Vice President and Director of Bortz & Company; Edwin S. Desser, President, NBA Television and New Media Ventures; Robert W Crandall, a Senior Fellow in Economic Studies, Brookings Institute; and Lawrence Gerbrandt, Senior Consultant, Kagan Media Appraisals, Senior Vice President and Senior Analyst, Paul Kagan Associates.

PBS presented written and oral testimony of two witnesses: John F. Wilson, Senior Director of Program Scheduling and Editorial Management, Public Broadcasting Service; and Linda McLaughlin, Economist and Vice President, National Economic Research Associates.

The Commercial Networks presented written and oral testimony of three witnesses: Thomas P. Olson, a partner at the law firm of Wilmer, Cutler & Pickering; Alan Sternfeld, Executive Vice President, ABC Entertainment; and Bruce Owen, President, Economists, Inc.

The Broadcaster Claimants presented written and oral testimony of William Graff, Director of Programming, WPIX, a New York City broadcast station.

The Program Suppliers presented written and oral testimony of two witnesses: Marsha E. Kessler, Vice President, Copyright Royalty Distribution, Motion Picture Association of America; and Allen R. Cooper, Vice President, Motion Picture Association of America.

The Music Claimants presented no testimony.[3]

The Devotional Claimants presented written and oral testimony of David Hummel, an

[3] *See* Order of Copyright Office, Docket No. 96-3 CARP-SRA (February 12, 1997).

independent marketing consultant.

SBCA presented written and oral testimony of four witnesses: Gerald L. Parker, Vice President of Programming and Legal Affairs for Superstar Satellite Entertainment, Officer of Superstar/Netlink Group, L.L.C.; Thomas A. Larson,[4] President, Cable Data Corporation; John R. Haring, a principal in Strategic Policy Research; and Harry M. Shooshan, III, also a principal in Strategic Policy Research.

ASkyB presented written and oral testimony of two witnesses: Preston R. Padden,[5] then Chairman and Chief Executive Officer, ASkyB; and William B. Shew, Visiting Scholar, American Enterprise Institute.

Industry Background

Under 17 U.S.C. § 119, television broadcast stations are categorized as either "network stations" or "superstations". Network stations are broadcast stations which are licensed by the Federal Communications Commission ("FCC") to provide television service in a particular local market and are (1) owned-and-operated by, or affiliated with, a commercial television network or (2) a noncommercial educational broadcast station. 17 U.S.C. § 119(d)(2); *Tr. 156-57*. Superstations are broadcast stations which are licensed by the FCC to provide television service in a particular local market and are *not* network stations as defined above *and* are secondarily transmitted by a satellite carrier. 17 U.S.C. § 119(d)(9). A "secondary transmission" is the

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[4] Mr. Larson's "written testimony" originally appeared as a "declaration" attached to Dr. Haring's written testimony. However, the parties ultimately agreed that Mr. Larson would testify orally. *Tr. 2894-97.*

[5] Apparently, Mr. Padden is no longer associated with ASkyB but his testimony continues to represent the position of ASkyB. *See ASkyB PFFCL pg. 1.*

further transmitting (retransmitting) of a primary broadcast transmission. 17 U.S.C. § 119(d)(7); 17 U.S.C. § 111(f).

The Commercial Networks purchase and produce programming for distribution through their owned-and-operated local stations and local network station affiliates. These local stations receive the programming "feed" by satellite, add their own programming, and then broadcast the signal over-the-air to viewers free of any charge. Commercial Networks pay their affiliates to distribute their programming which contains network national advertising. *Tr. 2064-68, 3226.* In accordance with their affiliation contracts, the local network affiliates also sell a certain amount of local advertising which is also inserted into the signal that is broadcast locally. *TR. 2070.* The Commercial Networks and their local affiliates rely, almost exclusively, upon the sale of the national and local advertising as their sources of revenue. *Tr. 501, 678-9, 1842, 2070.* Superstations also produce and purchase programming and, relying primarily upon advertising revenues, broadcast their signal free over-the-air. *Id.* Noncommercial public television stations also broadcast their signal free over-the-air, but are financed by direct government funding, corporate underwriting, and viewer contributions. *Tr. 1268-70.*

Cable networks are channels of programming originally developed for distribution to cable systems but are now also delivered to subscribers by satellite carriers and other subscription television distributors ("multichannel video program distributors"). *Written testimony (hereinafter "W.T.") of Trautman, pgs. 15-16.* Over 100 cable networks are available for distribution today. The vast majority of these cable networks present "niche programming" designed to appeal to a narrow audience but some offer more general programming calculated to reach a broader audience. *Tr. 163-65.* Unlike broadcast stations, cable networks are not subject to statutory compulsory licenses.[6] License fees for carriage of cable network signals are established through free market negotiations. *Tr. 168-69.*

Satellite carriers "uplink" and then deliver video programming services directly to satellite dishes located at subscribers' homes. This manner of delivery is known as "direct-to-home" ("DTH"). *Tr. 122-24, 2265.* Pursuant to SHVA (1988), the satellite carriers have been paying compulsory license fees semi-annually into a fund maintained by the Copyright Office for the rights to deliver (retransmit) network station and superstation signals to the DTH market.[7] 17 U.S.C. § 119(b)(1). Entities that have proprietary interests in the programming contained in the retransmitted signals (copyright owners) are entitled to portions of the royalties and, if unable to agree upon their respective allotments, may participate in separate royalty distribution proceedings. 17 U.S.C. § 119(b)(4). The satellite distribution technologies used by the satellite carriers are among several multichannel video program distribution technologies which are available, or soon to be available, to the public. The other technologies include cable television, multichannel multipoint distribution service, local multipoint distribution service, satellite master antenna television, and local exchange telephone carriers. *JSC Exh. 1B.* Multichannel video program distributors ("multichannel distributors"), such as the satellite carriers, sell packages of multichannel video programming directly to subscribers or through third party packagers and distributors. *Tr. 2266-68.* Cable television operators are the dominant distributors of

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[6] Satellite carriers may retransmit broadcast station signals by paying prescribed fees under a compulsory license (without obtaining express consent of the programming copyright owners) pursuant to 17 U.S.C. § 119 and cable operators do so under § 111.

[7] The original SHVA (1988) prescribed license fees of $0.03 per subscriber per month for network station signal and $0.12 p r subscriber per month for each superstation signal that each satellite carrier retransmitted to an individual DTH subscriber. *Tr. 580-81.*

multichannel video programming. Of all subscribers receiving packages of multichannel video programming in 1996, 89% received their programming from cable operators. *JSC Exh. 1B pg. 5* Satellite carriers deliver similar packages of programming to their subscribers, with greater channel capacities, but have captured less than 10% of the multichannel video market. *Id; W.T. of Trautman pg. 6; W.T. of Parker Exh. JP-F*

Satellite carriers deliver DTH services by two means. The home satellite dish industry ("HSD"; also known as the "C-band industry") uses the low-powered C-band frequency to transmit (or, in the case of a broadcast station signal, *retransmit*) programming from satellites to subscribers' C-band dishes. These HSD dishes are large and steerable for reception of multiple programming services from multiple satellites. *Tr. 122-23, 2264-65.* HSD carriers include Advance Entertainment Corp., Consumer Satellite Systems, Netlink USA, PrimeTime 24 Joint Venture, Southern Satellite Systems, Inc., and Superstar Satellite Entertainment. *W.T. of Trautman pg. 7* (the method of delivery utilized by BosCom is not reflected in the record). The more recent, direct broadcast satellite industry ("DBS") uses the medium, or high-powered, Ku-band frequency and obtain programming from either C-band satellite sources or ground transmission. It uplinks the programming from the source to transponders on a satellite and then downlinks to individual subscribers' DBS dishes. The DBS dishes are much smaller (18"-36" diameter) than HSD dishes and are fixed in place to receive a package of programming services from an individual DBS satellite. *Tr. 123.* DBS services also deliver a digitalized signal for higher resolution pictures than those delivered by HSD, cable and other analog services. *Tr. 187* DBS carriers include AlphaStar Television, Inc., DirecTV, Inc., EchoStar Satellite Corporation, and PrimeStar Partners, L.P. ASkyB also intend . to operate as a DBS carrier. *W.T. of Trautman* *pg.* [7] The number of subscribers to HSD services has stabilized, and may be declining, while the number of subscribers to DBS services is rapidly growing. *Id at 9; Tr. 2288.*

__History of the Cable and Satellite Statutory Licenses__

Prior to 1976, cable operators retransmitted broadcast signals with no copyright liability. *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974). In 1976, Congress enacted the Copyright Act of 1976, which established copyright liability for retransmission of broadcast signals but concomitantly provided cable operators a compulsory license and prescribed formulas for the payment of compulsory license fees. 17 U.S.C. § 111. The license fees are calculated by a percentage of certain defined revenues of cable operators and are paid to the Copyright Office semi-annually and ultimately distributed to copyright owners through distribution proceedings. 17 U.S.C. § 111(d)(3). Under the Section 111 compulsory cable license, cable operators do not generally pay any copyright license fees for the retransmission of local broadcast signals[8]. They are assessed one "distant signal equivalent" or "DSE" for each distant[9] independent (superstation) signal and one-quarter of a DSE for each distant network signal that they retransmit to subscribers. *Tr 1091-92, 2930-31.* This 4:1 ratio of license fees, for retransmitting distant superstation signals *vis-a-vis* distant network station signals, reflected a determination by Congress that the copyright owners of network programs had already received full compensation for nationwide distribution when they sold the rights to the networks. At the time section 111 was enacted, network programming constituted approximately 75% of the broadcast day of a typical network affiliate and *non*-network programming (local news, syndicated programming,

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[8] Retransmission of a broadcast station signal back into its local broadcast market.

[9] Retransmission of a broadcast station signal to an area outside of its local market.

etc.) comprised about 25% of a typical network affiliate. Accordingly, Congress reasoned that only 25% of the network affiliate signal should be compensable. 1988 SHVA Rep. at 22-23; *Tr 1093, 3483.* In short, cable operators pay no copyright license fees for any network programming, local or distant, and generally[10] pay no license fees for any retransmission of local broadcast signals. 17 U.S.C. § 111(d); *Tr. 464, 657, 3485.* However, they are also subject to various regulatory obligations which do not burden satellite carriers including syndicated exclusivity rules under 47 U.S.C. § 534(b)(3)(B) and must-carry rules under 47 U.S.C. § 534(b)(1)(B). *Tr. 3812-13, 3985-86.*

After satellite carriers began retransmitting broadcast signals directly to subscribers, Congress enacted the 1988 SHVA to provide a compulsory copyright license for the retransmisson of distant[11] broadcast signals by satellite carriers. The general purpose of the satellite compulsory license appears similar to that for cable operators but contains significant differences. To protect the unique relationship between broadcast commercial networks and their affiliates, section 119 restricts the retransmission of network signals to "unserved households" 17 U.S.C. § 119(a)(2)(B). An unserved household is one that cannot receive a signal of Grade B intensity, as defined by the FCC *and* did not subscribe to cable in the previous 90 days. 17 U.S.C. § 119(d)(10)(B). Areas which contain large concentrations of unserved households are known as "white areas". *Tr. 580.* Congress recognized that the ability of commercial network-affiliated

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[10] In the rare circumstances where a cable operator does not retransmit *any* distant broadcast signals, it must pay a minimum license fee. 17 U.S.C. § 111(d)(1)(B)(i).

[11] Satellite carriers did not possess the technology to retransmit local signals and SHVA did not address the issue. 17 U.S.C. § 119. ASkyB claims to be developing the technological capacity to retransmit *local* broadcast signals and has asked the Panel to set a separate rate structure for local retransmissions. *Tr. 3575-77.*

stations to generate advertising revenue would be compromised if satellite carriers were permitted to simultaneously deliver identical network programming from an out-of-local-market affiliated station to the local market served by another affiliate of the same network. H.R. Rep. No. 100-887, pt. 2 at 20 (1988). Unlike the cable compulsory license under section 111, the satellite compulsory license under section 119, prescribes fees based upon the number of subscribers. The originally prescribed fees of $0.12 per subscriber per month for superstations and $0.03 per subscriber per month for network stations were intended to approximate the license fees paid under section 111 for retransmitting similar distant signals by cable operators.[12] *Tr. 733, 735-37, 1082.* While no license fees are required of cable operators under section 111 for the network programming portion of commercial network station signals that they retransmit, network programming is compensable under section 119.[13] Finally, the section 111 cable license appears

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[12] Under the cable compulsory license statute, commercial network programming is explicitly non-compensable. 17 U.S.C. § 111(d)(3). By contrast, all network programming is compensable under SHVA. *See* section 119(b)(3) (fees shall be distributed "to those copyright owners whose works were included in a secondary transmission ... made by a satellite carrier."); 1989 Satellite Carrier Distribution Proceeding, 58 FR 20414 at 20416 (May 3, 1991) ("copyright owners of network programs are entitled to participate ... in the distribution of the satellite carrier fund."); *see also* 1991 Satellite Carrier Rate Adjustment Proceeding, 57 FR 19052 (May 1, 1992) (discussing declaratory ruling cited above). However, when enacting SHVA, Congress curiously maintained the 4 to 1 ratio of license fees, adopted from the cable statute. Apparently, Congress attempted to mechanically duplicate cable rates without considering the disparate copyright treatment accorded commercial network programming under the two statutes.

[13] *See* note 12, *supra*. Arguably, this disparate copyright treatment is reconcilable. The original reasoning applied by Congress, for treating network programming as noncompensable under section 111, does not precisely apply to satellite carriers. Cable operators generally retransmit commercial network signals to areas where the network signal is available over-the-air. Accordingly, copyright owners were already fully compensated when they sold the nationwide rights. More precisely, the copyright owners sold the network the rights to broadcast to all markets *served by that network*. By contrast, satellite carriers generally retransmit network signals only to white areas (unserved by the network) for which rights were not previously sold. However, this explanation is not fully satisfactory because cable operators may retransmit

permanent while the section 119 satellite license is temporary by its own terms and was originally scheduled to "sunset" in 1994. 17 U.S.C. § 111, 17 U.S.C. § 119 (1988). The 1988 SHVA also provided for an adjustment of the originally prescribed rates, to be effective from 1992 until sunset in 1994, through an arbitration proceeding before a panel of arbitrators whose findings were subject to review by the Copyright Royalty Tribunal.[14] 17 U.S.C. § 119(c)(2)(D) (1988). A panel was convened in 1992 to adjust the rates in accordance with the multiple criteria enumerated under the 1988 section 119(c)(3)(D).[15] The Copyright Royalty Tribunal adopted the arbitration panel's findings, with one technical amendment, and the royalty rates established by the panel have been effective since May 1, 1992. 57 FR 19052 (May 1, 1992). Under the 1992 adjusted rates, satellite carriers pay $0.175 per subscriber per month for retransmission of a superstation signal, unless all of the programming contained in the superstation signal is free from syndicated exclusivity protection under FCC rules ("syndex-proof" superstation signals), in which case the satellite carrier pays $0.14 per subscriber per month; and $0.06 per subscriber per month for network signals. *Id.* Under the 1994 SHVA, Congress extended the section 119 satellite compulsory license until December 31, 1999; authorized a rate adjustment arbitration proceeding before this Panel to set new rates effective from July 1, 1997 until the new sunset of December

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broadcast signals to some subscribers located in white areas and satellite carriers retransmit network signals to some unserved households located outside of white areas (*e.g.*, hilly areas). 17 U.S.C. § 119(d)(10)(B); *Tr. 2636*.

[14] Under the Copyright Royalty Tribunal Reform Act of 1993, Congress abolished the Tribunal and transferred its prior responsibilities directly to copyright arbitration royalty panels without any substantive copyright law changes. H.R. Rep. No. 103-286 at 12 (1993).

[15] *See* note 2, *supra*.

31, 1999; and repealed the former rate criteria, substituting a single "fair market value" criterion.[16]

17 U.S.C. § 119 (1994).

The Fair Market Value Criterion

Section 119(c)(3)(D) provides as follows:

> In determining royalty fees under this paragraph, the Copyright Arbitration Panel shall establish fees for the retransmission of network stations and superstations that most clearly represent the **fair market value** of secondary transmissions. In determining the **fair market value**, the Panel shall base its decision on economic, competitive, and programming information presented by the parties, including -
>
> (i) the competitive environment in which such programming is distributed, the cost for similar signals in similar private and compulsory license marketplaces, and any special features and conditions of the retransmission marketplace;
>
> (ii) the economic impact of such fees on copyright owners and satellite carriers; and
>
> (iii) the impact on the continued availability of secondary transmissions to the public. (Emphasis added).

Congress' intended meaning of "fair market value", within the context of section 119, was the subject of considerable testimony and argument.

The copyright owners are unanimous in their interpretation of fair market value as the price that *would be negotiated* in a free market setting as compensation for the satellite carriers' right to retransmit network and superstation signals containing the copyright owners copyrighted programming.[17] *See, e.g., Tr. 1199-1202.* They argue that Congress intended to adopt the well-

[16] *See* note 2, *supra*.

[17] JSC and the Commercial Networks further assert that these negotiations would proceed between satellite carriers, as "buyers", and copyright owners, as "sellers". *JSC PFFCL pg. 16; Commercial Networks PFFCL pg. 44.* We agree that satellite carriers would be "the buyers". But, negotiations need not necessarily involve copyright owners *directly* as sellers. In those

established willing buyer/willing seller definition among economists and in the law.[18] Moreover, because the meaning is plain, it is unnecessary to examine the legislative history. *See U.S. v. Gonzales*, 117 S. Ct. 1032, 1035 (1997). But, they assert, even if one were to explore the legislative history of the 1994 SHVA, the plain meaning is reinforced. The copyright owners further note that the fair market value standard is the single criterion to be applied and the enumerated list of "information" does not prescribe additional criteria that supplements the fair market value criterion. The non-exhaustive list of "information", they conclude, must be considered only for the purpose of "determining the fair market value."

By contrast, SBCA and ASkyB argue that the determination required by section 119 cannot be based upon a "standard" fair market value definition.[19] Rather, fair market value is defined by the statute itself and must be determined by applying the mandatory *criteria*. Of those criteria, Congress intended that "the cost for similar signals in similar private and compulsory license marketplaces" (the compulsory license fees paid by cable operators under section 111) should serve as the benchmark. SBCA contends that the legislative history reveals that Congress

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instances where broadcast stations have purchased the rights to authorize satellite carriers to retransmit the entire signals ("cleared" the copyrights for all programming contained in their signals), the ultimate retransmission negotiations would likely transpire between satellite carriers and broadcast stations (with no *direct* copyright owner involvement). Indeed, in this hypothetical free market scenario, failure of the broadcast stations to clear the rights would require each satellite carrier to negotiate with a myriad of copyright owners for each day's signal -- an extremely cumbersome and, perhaps impracticable process. *See e.g., JSC Exh. 21.*

[18] *See, e.g., BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1761 (1994) (Fair market value means "the price which [a commodity] might be expected to bring ... as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled..."

[19] *But see Tr. 3478* (SBCA witness concedes Congress intended the Panel to apply the commonly accepted meaning of "fair market value"

included the fair market value provision only upon the condition that parity with cable rates was preserved as the ultimate guideline.

The Panel perceives sufficient ambiguity[20] with respect to the term "fair market value" to warrant a review of SHVA legislative history. Our examination confirms the SBCA-ASkyB claim that some of the "information" considerations enumerated in section 119(c)(3)(D) were added through "difficult negotiations"[21] and "hard fought compromise".[22] However, while the list of considerations was ultimately expanded, the unitary fair market standard was never questioned nor modified. We find no support for the proposition that Congress did not mean what it said. The legislative history reveals no intent to attach a unique meaning to the commonly understood and well-established "fair market value" term. If Congress had intended the Panel to simply set an *appropriate* rate derived from prescribed *criteria*, it could have quite easily so directed. And if Congress had intended, as SBCA-ASkyB further suggest, that the Panel set a rate that most closely achieves parity with cable operators, it could have declined to modify the 1988 statute; included satellite carriers under section 111; or simply so directed. Congress did none of these. A few legislators expressed their desire to promote viable competition by fostering parity with cable operators. *See* 140 Cong. Rec. S14105 (daily ed. Oct. 4, 1994). But, the language,

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[20] *See, e.g., Tr 3950-53* (ASkyB witness opines that the Congressionally mandated considerations are not relevant to a traditional fair market value inquiry). Moreover, one can reasonably argue that Congress created ambiguity when it *required* the Panel to consider any *particular* factors rather than simply directing the Panel to determine "fair market value". The fair market rate, as would be negotiated in a free market, should not vary according to *which* factors are considered.

[21] 140 Cong. Rec. S14105 (daily ed. Oct. 4, 1994)

[22] 140 Cong. Rec. H9270 (daily ed. Sept. 20, 1994)

structure, and legislative history of the 1994 amendments to section 119 suggest the Panel is directed to determine actual *fair market value* and "in determining the fair market value ... base its decision ..." upon the non-exhaustive list of *considerations*. We interpret the phrase "base its decision" to require the Panel to *consider* each enumerated type of information but, the weight to be accorded each consideration must necessarily depend upon the quality and quantity of the evidence adduced and *its relative significance to a determination of actual fair market value*. All evidence falling within the enumerated types of information must be considered but evidence which is more probative of *fair market value* must be accorded greater weight than less probative evidence. Accordingly, we generally accept the copyright owners' interpretation. The Panel agrees that the fair market value rate is that which most closely approximates the rate that would be negotiated in a free market between a willing buyer and willing seller.

The Appropriate Benchmark for Determining Fair Market Value

Having concluded that Congress intended the Panel to determine the "fair market value", in accordance with its ordinary and generally accepted meaning, of retransmitted broadcast signals, we direct our attention to that determination. Numerous witnesses testified regarding the availability and value (importance to viewers) of particular types of programming and programming services; the technologies used; the business dynamics and structure of the various industries; the financial health of the industries; and the general economic models governing each industry. Witnesses for PBS, JSC, the Commercial Networks, SBCA, and ASkyB also sponsored economic analyses and testified as to their calculation of "fair market value". Two general approaches to the valuation problem emerged. The copyright owners used empirical data of license fees paid to certain cable networks by multichannel distributors (primarily cable operators) for the rights to carry cable network programming. This programming closely resembles broadcast programming and, presumably, the fees paid were the result of free market negotiations. Accordingly, the copyright owners advocate using these license fees as a valuation "benchmark" to determine fair market value of broadcast signals. The satellite carriers and ASkyB reject this approach. They urge the Panel instead to focus primarily[23] upon the license fees paid by cable operators, under the section 111 compulsory license, for the retransmission of broadcast signals by cable operators. A brief description of each analysis follows.

The PBS Analysis

Network stations, superstations, and cable networks are all in competition to be carried in programming packages for sale to satellite subscribers. *Tr. 2656*. Basic cable networks, channels that have typically been included in basic packages of services offered by cable operators and satellite carriers, are the closest alternative to receiving retransmitted broadcast stations available to satellite subscribers--particularly subscribers residing in white areas. *Tr. 163-64, 1612-13*. The PBS expert, Linda McLaughlin, concluded from viewer rating surveys that subscriber demand for broadcast stations was at least as high as the demand for 12 popular[24] basic cable networks and, consequently, satellite carriers would be willing to pay at least as much for the rights to retransmit broadcast stations as for these 12 popular basic cable networks. *Tr. 1617-18*. Ms. McLaughlin used data from Paul Kagan Associates ("Kagan") reflecting average license fees paid by all

[23] The satellite carriers also advance alternative arguments, such as the value of primary transmissions, the history of retransmission consent negotiations and the nature of commercial network--affiliate relationships, discussed *infra*, to support a determination of fair market value.

[24] These 12 basic cable networks are distributed to about 90% of cable households. *Tr. 1626*. They consist of A&E; CNN; Headline News; DSC; ESPN; FAM; Life; MTV; Nick; TNN; TNT, and USA. *W.T. of McLaughlin Table 2*.

multichannel distributors[25] to the 12 popular basic cable networks. *Tr. 1757-58.* She divided the total license fees by 12 (number of cable networks) and then by the estimated total number of subscribers.[26] This figure was again divided by 12 to determine the average license fee per subscriber per month. This calculation was performed for the years 1992, 1993, 1994 and 1995, and the results were $0.18, $0.20, $0.22, and $0.24, respectively, reflecting an ***annualized*** increase of 10% from 1992 to 1995. Presuming a continuation of the annualized increase of 10% through 1997, Ms. McLaughlin calculated the projected average license fee for 1997 to be $0.26 per subscriber per month. However, for 1998 through 1999, Ms. McLaughlin utilized an annual increase of only 4.7%[27] and calculated the projected average license fees for the 12 basic cable networks to be $0.27 for 1998 and $0.28 for 1999 This analysis is premised upon a presumption that satellite carriers are actually paying no less than the average fees paid by all multichannel distributors for these basic cable networks.[28] Accordingly, PBS argues that $0.27 per subscriber

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[25] Because cable operators comprise almost 90% of the multichannel video market (*JSC Exh. 1B at pg. 5*), these figures primarily reflect average license fees paid by cable operators. Discrete figures representing license fees paid only by satellite carriers have not been made available for analysis. *Tr. 1654, 1758-59.*

[26] The number of subscribers was adjusted by deducting an estimated 8% of subscribers reported as non-paying--illegal, citing *Cable TV Programming, September 30, 1995, pg. 5.*

[27] Again citing *Cable TV Programming, supra, at pg. 2.*

[28] *See note* 25, *supra*. Because data reflecting license fees paid by satellite carriers for cable networks are within the possession of the satellite carriers and they failed to present them, the copyright owners urge us to draw an "adverse inference" that the satellite carriers are paying average rates as high, or higher, than those paid by other multichannel distributors (cable operators). *See e.g., Commercial Networks Reply PFFCL pg. 28.* The satellite carriers respond that pursuant to standard confidentiality clauses contained in their cable network contracts, they are not permitted to reveal the rate figures. Moreover, they contend, in isolation, the license fees are meaningless. Many inter-related provisions are negotiated in conjunction with the license fees which are reflected in the ultimate price including marketing fees, advertising availabilities, and

per month represents a *minimum* rate (averaged over the 3 year statutory period) and no adjustments (e.g., for special costs incurred by satellite carriers or the unavailability of advertising inserts under section 119--both discussed *infra*) need be deducted from this benchmark rate.

Finally, Ms. McLaughlin examined the historical growth of the satellite industry, the impact of past royalty fee increases upon the revenues and marginal profits of two carriers, and the impact of past price increases upon subscriber demand. She concluded that a rise in the compulsory license fee rate to $0.27 per subscriber per month would have no significant adverse impact on the satellite carriers or the availability of secondary transmissions to satellite subscribers. Tr. 1628-33; 1772-73.

The JSC Analysis

JSC sponsored a study supervised and presented by Larry Gerbrandt. Mr. Gerbrandt approached the valuation problem in a manner very similar to Ms. McLaughlin's study. Mr. Gerbrandt first examined the types of programming carried by the broadcast stations whose signals are retransmitted by the satellite carriers. He then identified those cable networks that carried programming most comparable to programming carried by the retransmitted broadcast stations. *Tr. 2001; 2003-16.* The study revealed that both USA and TNT carry general entertainment programming comparable to that of broadcast stations designed for appeal to a broad based audience. *Tr. 2025-26.* Using Kagan data, Mr. Gerbrandt then determined the total license fee revenue paid by all multichannel distributors (again, primarily by cable operators) to

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"launch support" for new cable networks. *Tr. 2526-28, 2552-53.* Finally, the satellite carriers argue that because the Commercial Networks own significant interests in some cable networks, the Commercial Networks could have produced similar data but declined. Hence, they urge us to draw no adverse inference. *Satellite carriers Reply PFFCL pgs. 31-32. Also see Tr. 2552-53.*

USA and TNT, divided by the estimated number of subscribers to each network (as adjusted for illegal subscribers), and divided again by 12 to calculate the fee per subscriber per month for USA and TNT. *Tr. 2014-17.* Mr. Gerbrandt opined that although TNT did not regularly program news, TNT programming was most comparable to broadcast station programming because USA did not carry valuable sports programming. Consequently, the calculated fee per subscriber rate for TNT exceeded that of USA. *Tr. 2026; W.T. of Gerbrandt pg. 12.* However, "in the interest of being conservative", Mr. Gerbrandt chose to advocate using the calculated USA fee per subscriber rate to establish "the lower bound". *Tr. 2026-27.* The USA fee per subscriber per month rate was based upon data for the years 1992 and 1995 and calculated as $0.22 for 1992, and $0.31 for 1995. Fees per subscriber per month for 1997, 1998, and 1998, were projected based upon Kagan estimates[29] of future fees for these years and calculated to be $0.35, $0.36, and $0.38, respectively.[30] *Tr. 2027; W.T. of Gerbrandt pgs. 13-14.* Mr. Gerbrandt opined that the broadcast stations retransmitted by satellite carriers are "roughly comparable in value to each other -- that is, in a free market (absent compulsory licensing) satellite carriers ... would pay approximately the same license fee to retransmit each ..." *W.T. of Gerbrandt pg. 7.*

Mr. Gerbrandt did not analyze the economic impact, nor the impact on the continued

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[29] The estimates for 1997 revenues were published prior to this proceeding while the 1998 and 1999 figures were estimated specifically for this proceeding. *Tr. 2017-18.*

[30] Mr. Gerbrandt also presented a higher, alternative proposed rate pursuant to an "updated Silberman analysis". *W.T. of Gerbrandt pgs. 17-19.* It would appear that JSC presented this "update" more as an illustration of how Mr. Gerbrandt addressed criticisms expressed by the 1992 panel of the original Silberman analysis, rather than as a serious valuation proposal. *See Tr. 2032, 2123-24.* In any event, the Panel rejects the use of "top-of-the-ratecard" data employed in this analysis. We similarly reject the SBCA sponsored updated Silberman analysis which utilized average license fees for some calculations but top-of-the-ratecard data for others. *Tr. 3129-31.*

availability of secondary transmissions, of his proposed rates. However, JSC argues that the totality of evidence supports a conclusion that the satellite carriers can fully absorb their advocated higher rates. Should the satellite carriers elect to fully pass on the higher retransmission rates to their subscribers, the impact would similarly be minimal because the recent history of subscriber fee increases reflects an inelastic demand. *See JSC PFFCL pgs. 68-71.*

Excepting the Commercial Networks, all other copyright owners, including PBS, support the rates advocated by JSC. PBS maintains that because Ms. McLaughlin derived her rates from license fees paid for a group of widely carried basic cable networks, rather than confining her study to those cable networks that carry programming comparable to the more "valuable" programming carried by broadcast stations, the McLaughlin study merely established a "minimum benchmark". *PBS PFFCL pg. 16.*

The Commercial Networks Analysis

The Commercial Networks expert, Bruce Owen, also examined the license fees paid to basic cable networks by multichannel distributors.[31] He found a compelling statistical correlation between the amount a cable network spends for its programming and the license fees paid by multichannel distributors for the rights to carry that cable network. This correlation reveals that multichannel distributors are willing to pay higher license fees to carry cable networks with more expensive programming. *Tr. 1810-12.* Accordingly, Dr. Owen concluded that multichannel distributors (including satellite carriers) would be willing to pay proportionally higher license fees

[31] In his testimony, Dr. Owen consistently referred to "license fees paid by cable operators". However, he clearly meant license fees paid by all multichannel distributors consisting *primarily* of cable operators. *W.T. of Owen, Table A-2; W.T of Gerbrandt, Appendix B, Pg. 22; Tr. 2014.*

for the Commercial Network signals which contain much more expensive programming. He calculated that figure by regression analysis which essentially entails linearly projecting the empirical data with respect to the license fees paid for cable networks and the program expenditures of those cable networks. *Tr. 1813-16; W.T. of Owen pgs. 7-10.* The extrapolated figure, reflecting the much higher Commercial Network programming expenditures, is $1.30 per subscriber per month. Dr. Owen then deducted $0.08 to:

> account for the facts, which may or not be a fact, that satellite carriers don't or didn't get the opportunity to assert (sic) advertising in the cable networks, whereas the cable operators do get that opportunity. And the eight cents comes from the previous proceeding,[32] and it was also used by John Herring (sic) in his testimony. So I don't think it's a controversial number. *Tr. 1824-25.*

Because the Commercial Networks' programming expenditures vastly exceed those of the basic cable networks (the empirical data) with a concomitant huge increase in extrapolated license fees for Commercial Networks, the potential for prediction error is also huge. Accordingly, in order to achieve a 95% statistical confidence level for his calculated $1.22 rate, Dr. Owen conceded an error margin of plus or minus $0.55. *Tr. 1821-22.*

Dr. Owen then explored the potential impact of his proposed rate. His examination revealed that a rate of $1.22 per subscriber per month would have no significant negative impact on the satellite carriers or their subscribers. Indeed, he opined that subscribers would ***benefit*** because broadcasters and copyright owners would likely use the increased revenues to enhance program quality. *W.T. of Owen pgs. 31-37.*

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[32] The correct figure was actually $0.71 but after accounting for inflation since 1992, the figure increases to approximately eight cents. *W.T. of Owen, Appendix A pg. 44.*

The SBCA Analysis

The satellite carriers naturally approached the valuation issue primarily in accordance with their concept of "fair market value" discussed *supra*. John Haring conducted a study of the actual license fees paid by all cable operators in 1995, under section 111, for retransmitting distant broadcast stations. He calculated the average rate for retransmission of superstation (distant) signals to be $0.098 per subscriber per month and distant[33] network signals to be $0.0245 per subscriber per month in the second accounting period of 1995.[34] When the study sample is confined only to Form 3 cable operators,[35] the calculated rates are $0.1132 and $0.0283 respectively. *W.T. of Haring pgs. 4-6; SBCA Hearing Exhs.4 and 5; Tr. 3084.*

Alternatively, Dr. Haring opined that because the satellite carriers' retail revenue per signal has declined by almost 35% since the 1992 section 119 rates were imposed, it would be reasonable to set a new rate 35% below existing section 119 rates. This implies rates of $0.0917 (assumes no non-syndex-proof rate) and $0.031 respectively. *W.T. of Haring pg. 11-12; SBCA*

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[33] Cable operators generally pay no license fees for local retransmissions.

[34] As described *supra*, distant network signals are assessed a one-quarter DSE. *Tr 1091-92, 2930-31.*

[35] Cable operators pay license fees under section 111 according to variously prescribed factors including their size (revenues). Smaller operators pay in accordance with flat fees prescribed for "Form 1" and "Form 2" operators while the larger operators (over $292,000 in semi-annual gross receipts) pay under "Form 3". Under Form 3, a base rate is paid for distant broadcast signals which would have been permitted under FCC signal carriage quotas that prevailed during the 1970s. The base rate varies according to the number of DSEs assessed. The first DSE is charged at .893% of the gross receipts, the second through fifth DSEs are charged at .563%, and the sixth DSE or higher are charged at .265%. A separate rate of 3.75% of gross receipts is paid for retransmission of a distant broadcast signal which would not have been permitted under the FCC signal carriage rules. *W.T. of Haring pg. 5; Tr. 735-36, 1085, 1143-44, 1151-53.*

Hearing Exhs. 5 and 7; Tr. 3088-91.

SBCA advances three other arguments which, they assert, suggests a fair market value (under the *conventional definition*) as the rate paid by cable operators under section 111, or less. It notes firstly, unlike cable networks, the primary transmission of broadcast signals is voluntarily "broadcast" to the public free of any charge with an open invitation to all viewers with receiving equipment. It should be of no concern to broadcasters whether the viewer purchases rabbit ears, a rooftop antenna, a cable subscription, or a satellite dish in order to view the free primary transmission. As SBCA further notes, the broadcasters pay for the programming contained in their signals but only for the purpose of selling advertising. The fair market value of these primary transmissions to viewers is necessarily zero and, SBCA infers, the fair market value of retransmitting a primary transmission must also be zero. *See e.g., SBCA Reply PFFCL pgs. 80-81.*

Secondly, SBCA cites the recent history of retransmission consent negotiations between certain network owned-and-operated affiliates and certain cable operators. Cable operators are required to carry (under FCC "must-carry rules") a significant number of local broadcast stations (local retransmissions) up to one-third of their total channel capacity. Pursuant to the 1992 Cable Act, "retransmission consent" rules were also promulgated.[36] Effective in 1993, every three years, broadcast stations must elect between must-carry and retransmission consent. 47 U.S.C § 325(b)(3)(B). If a broadcast station elects retransmission consent, it forfeits its unconditional right to local retransmission by the local cable operator. However, it would be free to negotiate

[36] Satellite carriers are not subject to must-carry rules but, *with major exemptions*, they are subject to retransmission consent rules. 47 U.S.C §§ 325(b)(2) and 534.

for remuneration (beyond any compulsory license fees the operator must pay, if any) from any local cable operator (or distant cable operator that seeks to retransmit its signal) in consideration for its consent to permit retransmission of its signal by that operator. *Id*; *Tr. 2108.* In 1993, and apparently again in 1996, several owned-and-operated commercial network stations (ABC, NBC and CBS affiliates) elected retransmission consent and sought to extract cash remuneration from cable operators. They generally failed in this endeavor. *Tr. 1648-53, 2108-2112.* The cable operators refused to pay any cash consideration (above the royalty payments required under section 111) but most agreed to carry newly "launched" cable networks created and owned by the commercial networks such as ABC's ESPN2 and NBC's MSNBC.[37] SBCA suggests these *actual free market* results confirm its view that the fair market value of retransmitted broadcast signals, particularly commercial network signals, is little or nothing beyond the section 111 compulsory license fees.

Finally, SBCA stresses that Commercial Networks pay their affiliates to distribute their programming which contains network national advertising. *Tr. 142, 2064-68, 3226.* Satellite carriers perceive themselves as performing an identical function on behalf of the commercial networks. They expand the reach of the network signals into white areas thereby delivering millions of additional viewers of network national advertising. *Tr. 3225.* The Commercial Networks (through their affiliates) could reach these valuable additional viewers by constructing translators in white areas but they have instead enjoyed the benefits of the satellite carriers

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[37] Though no cash was paid, the Commercial Networks deemed the mere commitment by cable operators to carry these upstarts as worth "potentially hundreds of millions of dollars" to the Commercial Networks. *Tr. 2175.* The last retransmission consent negotiations involving CBS owned-and-operated stations did not even yield a cable network carriage commitment for CBS. Retransmission continued without consideration of any kind. *Tr. 1651-52, 2109-10.*

investments and entrepreneurial endeavors. Tr. 693, 3533-34. Accordingly, SBCA argues, the Commercial Networks should compensate the satellite carriers as affiliates; not *vice-versa*. Tr. 3225-28.

The ASkyB Analysis

Heretofore, satellite carriers have not possessed the technology to retransmit local signals and, consequently, SHVA has not previously addressed an applicable license rate. 17 U.S.C. § 119. ASkyB, possibly in cooperation with other DBS carriers, claims to be developing the technological capacity to retransmit *local* broadcast signals and has requested the Panel to set a separate rate structure for local retransmissions. *Tr. 3575-77.* As discussed *supra*, motions to deny ASkyB's right to request a special rate for local retransmissions are pending and shall be addressed *infra*.

As did SBCA, ASkyB adduced evidence of value in accordance with its concept of the term "fair market value" within the context of section 119. After analyzing the enumerated considerations of section 119(c)(3)(D), the ASkyB expert witnesses, Preston Padden and William Shew, opined that the *appropriate* rate for the *local* retransmissions of broadcast signals is zero. *Tr. 3849-50, 3950.* In the only other "similar marketplace", cable operators generally pay nothing for retransmission of local signals under section 111. *Tr. 3596-98.* The "competitive environment" is dominated by cable operators because satellite carriers have not possessed the technology to locally retransmit broadcast signals and cable operators have effectively exploited that inability. *W.T. of Padden pgs. 15-16*; *Tr. 3593-95.* ASkyB witnesses also addressed the "economic impact" of a zero rate on copyright owners and satellite carriers. They opined that copyright owners are not negatively impacted by local retransmissions because the programming